No. 02-1773

(4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DO GEUN OH, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

SUK YOON KIM, on behalf of himself and all others similarly situated,

Petitioner,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., *et al.*,

Respondents.

SA SON SIN,

Petitioner,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

JAE SIK CHOE,

Petitioner,

v.

NIPPON STEEL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The centuries-old doctrine, affirmed and refined in June by this Court in *Garamendi*,[1] for determining when federal foreign-affairs powers preempt a state-law claim hinges on finding a conflict between the state-law claim and a federal international agreement. But the Ninth Circuit decision disregarded this time-honored preemption doctrine, creating instead a novel and competing rule that ignores federal/state conflict while preempting any state-law claim that somehow "relates to war." Petitioners asked this Court to review that decision and conform it to the established foreign-affairs doctrine.

Respondents dispute none of this – nor say much at all about the Ninth Circuit decision and the primary grounds for review. They do not dispute that the Ninth Circuit conjured a novel rule of law that displaces the established standard described and refined in *Garamendi*. Nor do they challenge that courts within the Ninth Circuit will be forced to employ this competing rule, and courts elsewhere will be free to use it – and disregard *Garamendi*. They are silent to the fact that neither decision explains when its rule should supersede the other. Respondents thus can little contest that this Court should grant the petition to conform the Ninth Circuit's rogue preemption rule to *Garamendi*.

Respondents instead argue, in essence, that the Ninth Circuit's error is harmless because applying *Garamendi* to petitioners' claims would produce the same result. But respondents are wrong. To the extent the Ninth Circuit decision can be read to invoke field preemption, as respondents seem to argue, *Garamendi* does not adopt that as an alterative preemption test. The Court instead embraced conflict preemption and did not rule on any alternative test. Moreover, the four-justice dissent

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1. *Am. Ins. Ass'n v. Garamendi*, __ U.S. __, 156 L. Ed. 2d 376, 123 S. Ct. 2374 (2003).

made clear its view that foreign-affairs preemption requires an explicit conflict – and that nothing less would do.

Nor is there any conflict here between a federal agreement and state law, as there was in *Garamendi*. As both lower courts agreed, these petitioners' state-law claims present no conflict with federal foreign-affairs powers that could trigger preemption for the simple reason that no U.S. treaty or other federal action governs these petitioners' claims against the private corporate defendants.

ARGUMENT

A. *Garamendi* Does Not Cure The Ninth Circuit's Error

Respondents say little about the Ninth Circuit decision at issue here, citing instead only the occasional snippet from it. And to the extent respondents refer to the decision at all, they rewrite it and *Garamendi* as well in an effort to contrive some consistency.

But the decisions are contrary. As petitioners already established, the Ninth Circuit explicitly declined to decide the appeal under the foreign-affairs doctrine. Rather, the court was clear that its novel preemption rule was an ***alternative*** analysis. After describing the conventional doctrine, the court then declined to apply it, stating:

> Although we agree that [§] 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. [Apdx. A at 23a.]

The court went on to fabricate its all-things-related-to-war preemption rule, making no effort to link it to existing foreign-affairs preemption analysis. Rather, the court designated far-reaching categories of matters as "relating to war" – including even the cold-war inheritance statute at issue in *Zschernig v. Miller*, 389 U.S. 429 (1968), *see* Apdx. A at 21a-22a – and then ruled that these matters are categorically off limits for states.

Apdx. A at 22a. The Ninth Circuit thus did not base its decision on any existing facet of the foreign-affairs doctrine.

Tellingly, beyond twisting the Ninth Circuit's related-to-war preemption rule into something it was not, respondents do little to defend it. Instead they respond to the petition for review by discussing *Garamendi* and asserting other, extraneous arguments that, respondents assert, offer alternative grounds for dismissing petitioners' claims. Although respondents ignore the Ninth Circuit's analysis, this Court should not. As petitioners anticipated (*see* Pet. at 29-30), *Garamendi* did not address the Ninth Circuit's all-things-related-to-war rule, thereby leaving courts within the Ninth Circuit obliged to apply this new rule as an alternative and competing preemption standard unencumbered by *Garamendi*. But the Ninth Circuit decision should not displace *Garamendi*. It thus merits the Court's full review.

Moreover, no one – and certainly not respondents – disputes the atrocities that petitioners and other forced-labor victims endured at the hands of respondents or their affiliates more than 50 years ago. No one disputes that the corporate perpetrators have not paid a penny of compensation nor offered the slightest apology to petitioners and other forced-labor victims. And no one disputes that California's § 354.6 offers petitioners and other victims their last opportunity to obtain some relief. The Ninth Circuit devised an erroneous rule of law to affirm dismissal of their claims. Not only must that rule not be allowed to challenge the correct rule set forth in *Garamendi*, but it also should not be permitted to deny justice to respondents' aging victims. Petitioners therefore ask the Court to accept review.

B. *Garamendi* Did Not Adopt Field Preemption As An Alternate Foreign-Affairs Test

Respondents pin their opposition partly on the contention that *Garamendi* recognized field preemption as a test of the foreign-affairs doctrine. But *Garamendi* did not do so. Rather, central to the *Garamendi* preemption analysis was the conflict between Californian and federal efforts to address the same matters. The result hinged on the finding of a direct conflict between a federal agreement and state law:

> . . . we think petitioners and the Government have demonstrated a sufficiently clear conflict to require finding preemption here. [123 S. Ct. at 2390.]

By adopting conflict preemption as the test under the foreign-affairs doctrine, *Garamendi* did not require nor provide a ruling on field preemption. 123 S. Ct. at 2389 ("but the question requires no answer here"). Further, the four-justice dissent squarely rejected field preemption in this arena. *Id.* at 2401 ("courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds"); *see also id.* at 2399-2400.

Accordingly, notwithstanding respondents' wistful argument, *Garamendi* did not append field preemption to the foreign-affairs doctrine. Preemption under *Garamendi* requires a conflict, and there is none here. And to the extent the Ninth Circuit decision can be read to invoke a form of field preemption, *Garamendi* provides scant support for such a rule of law. Four justices of this Court plainly rejected it and the majority did not address it. As an alternative basis for review, however, this Court should accept review to resolve the question left unanswered in *Garamendi* – whether field preemption is a separate and independent component of the foreign-affairs doctrine.

C. *Garamendi* Confirms That Federal Power Over Foreign Affairs Does Not Bar Petitioners' Claims

Respondents also appear to contend that the Court should deny review because the Ninth Circuit's error was harmless, as petitioners' claims would, according to respondents, be dismissed under *Garamendi*'s conflict preemption test. But petitioners' state-law claims would survive under *Garamendi* because they are distinguishable from the claims at issue there. Respondents' purported "correct result" argument is thus misplaced and offers no reason to deny review.

1. There is no conflict here because no U.S. treaty bars these petitioners' claims

As just shown, *Garamendi* required proof of a conflict between state and federal actions to trigger preemption under for foreign-affairs doctrine. There, the federal government had negotiated with several European governments and insurance companies mechanisms for disclosing potential claims arising from the denial of insurance benefits to Holocaust victims or their descendents and to resolve these claims. Meanwhile, the state of California enacted a law establishing an alternative means to address the same issues. The majority in *Garamendi* found that the California statute at issue "undercuts the President's diplomatic discretion and the choice he has made exercising it," so that it "threatens to frustrate the operation of the particular mechanism the President has chosen." 123 S. Ct. at 2391, 2392. The majority viewed the state statute as "thwarting the Government's policy of repose" and placing "a handicap" on the effectiveness of the Government's chosen mechanism. *Id.* at 2392. The statute thus was "an obstacle" to the Government's policy choice. To the majority, the conflict was clear.[2]

2. Four justices dissented. They agreed with the majority that preemption required conflict between state and federal approaches, but

(Cont'd)

But there is no corresponding conflict here. No U.S. treaty or other international agreement governs petitioners' claims. Rejecting the same argument that respondents assert here, the district court below explicitly found that the only possibly relevant U.S. treaty, the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, did not address tort and contract claims brought by these petitioners. The court hence ruled that § 354.6 "does not conflict with the expressed intent of the treaty. Accordingly, the treaty itself does not trump the California law in this respect." Apdx. B at 52a. The Ninth Circuit did not disagree, noting correctly that Korea and China "were not signatories of the San Francisco treaty." Apdx. A at 28a n.14.[3]

These courts rejected respondents' treaty-conflict argument for good reason. Respondents overlook here – as they did below – that the 1951 treaty expressly excluded Korea (and China) from the definition of "Allied Powers." *See* Respondents' Br. at 2a-3a (Articles 2(a) and 4(a)); *see also id.* at 18a-19a (Articles 23a and 25). As the district court found, when the treaty's Article 14(b) waived "reparations claims of the Allied Powers" arising from "prosecution of the war" (*id.* at 12a-13a), the waiver thus had "no effect on the claims of nationals from non-signatory nations." Apdx. B at 50a. The district court properly concluded that the 1951 treaty's text demonstrated the United States' intent ***not*** to resolve Korean nationals' individual claims:

(Cont'd)

differed as to the requisite degree. The dissent would require direct conflict between the state law and a formal federal international agreement. *Id.* at 2395, 2399 (Ginsburg, J., dissenting).

3. The Ninth Circuit found the treaty pertinent, not for whether it addressed claims of Korean nationals (or anyone else, for that matter), but instead because it did not affirmatively authorize "a private right of action against Japan or its nationals, or authorize[] states of the United States to create such a right." Apdx. A at 27a.

> The court reads the language of articles 4(a) and 26 to suggest only that the signatory nations, including the federal government of the United States, did not intend the Treaty of Peace with Japan to control claims of individuals from non-signatory nations. [*Id.* at 52a.]

Respondents had argued that Article 26 of the treaty, which provides "Japan will be prepared to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same . . . terms as are provided for in the present Treaty" (Respondents' Br. at 19a-20a), proves otherwise. This clause obligated Japan to agree to terms with other nations desiring to enter such treaties that would be as least as favorable as the 1951 treaty terms. But Article 26 was silent to Korean citizens' tort and contract claims against private corporations. And it certainly did not oblige the government of Korea to negotiate on the matter – nor agree to bar its own nationals' claims for wartime injuries.

Respondents also urged that the Allied Powers eliminated Korean nationals' ability to pursue claims against Japanese companies for wartime misconduct in Article 4(a) of the 1951 treaty. But Article 4(a) did nothing of the sort. It instead compelled Japan to deal with the "authorities presently administering such areas" identified in Article 2 over which Imperial Japan previously asserted sovereignty but now "renounce[d] all right, title and claim." Respondents' Br. at 2a-3a. Those former colonies and territories included Korea. *Id.* at 2a.

Further, the Allied Powers simply did not represent those regions' residents, and thus Article 4(a) left the disposition "in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals" to "special arrangements between Japan and

such authorities." *Id.* at 3a. The treaty accordingly required Japan to recognize "such authorities" that governed Japan's former territories. But Article 4(a) did not require any of those authorities to waive their citizens' claims stemming from war-era violations.

In short, as the district court concluded and the Ninth Circuit did not disagree, the 1951 treaty reflects that Korea was not a signatory and the Allied Powers did not represent its residents. No court should rewrite the treaty to bar assertion of Korean nationals' claims. *See generally Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) ("[t]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions"; citations and internal quotation marks omitted). *United States v. Alvarez-Machain*, 504 U.S. 655, 665-66 (1992) (refusing to imply terms into treaty). The treaty thus does not govern nor conflict with petitioners' tort and contract claims asserted under § 354.6.

2. Section 354.6 is a proper exercise of California's state interest

The state's interest in the matter is a counterbalance in *Garamendi*'s conflict analysis. Here, Congress and the Constitution allocated to the states jurisdiction over transitory actions for private wrongs sounding in tort and contract law:

> Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. [*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 285 (1908).]

Indeed, this Court has long left to the states to decide "whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions." *General Oil Co. v. Crain*, 209 U.S. 211, 224 (1908); *accord Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

California has done just that. Enacting § 354.6, the California Legislature declared that state policy is to provide a "hearing" for forced-labor victims who provided "ill-gotten wealth" to firms "presently doing business in California." C.C.P. § 354.6 statutory notes (Appendix hereto ("Reply Apdx.") at 1a). California is constitutionally entitled to exercise jurisdiction over those companies doing business in the State. *See Goad v. Celotex Corp.*, 831 F.2d 508, 513 (4th Cir. 1987).

Further, this nation has long operated on the premise, consistent with international law, that because limitations periods are procedural in character, local forums are entitled to apply their own local limitations periods – and to change them as they please. Applying the local forum's limitations period without regard to where – or under what law – the underlying claims arose was "the rule in international law at the time the Constitution was adopted," when "there was no other developed body of conflicts law to which courts in our new Union could turn for guidance." *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 723-24 (1988); *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 326-27 (1839) (on choice of limitations periods "the lex fori must prevail"); *Le Roy v. Crowninshield*, 15 F. Cas. 362, 365, 371 (No. 8269) (C.C.D. Mass. 1820) (Story, J.) (collecting cases). This rule remains a fundamental part of our constitutional jurisprudence – governing relations among the several states, under the full-faith-and-credit clause as well. *Sun Oil*, 486 U.S. at 723-26. Limitations periods involve the choice of local rules that, consistent with the "well understood rights of nations," is committed to a forum state's sovereign power, to be exercised

by it without fear that any other nation or state might take offense. *M'Elmoyle*, 38 U.S. (13 Pet.) at 327; *see Sun Oil*, 486 U.S. at 724-26.

Contrary to respondents' assertion that § 354.6 does not involve any "traditional state concern," California has a strong and legitimate interest in providing a "hearing" to forced-labor victims, whose labor provided the "basis of ill-gotten wealth" for many large "firms presently doing business in California." Cal. Stats. 1999, c.216 § 2 (S.B. 1245) (Reply Apdx. at 1a). Many thousands of forced-labor victims live in California – whether as resident aliens or naturalized citizens. *See id.* California has an overriding interest, moreover, both in regulating corporations that do business within its borders, and in ensuring that those corporations take responsibility for their tortious acts.[4] That interest encompasses respondents, which are enormous participants in and beneficiaries of the California economy – among nearly 1200 Japanese-owned or affiliated companies operating in California. California has a current, vital, continuing and important interest in the conduct of corporations that benefit from operating in the State.

D. Respondents Assert Extraneous And Irrelevant Issues to Obscure The Ninth Circuit's Error

Finally, respondents repeat some of the alternative dismissal arguments they asserted below. Neither lower court adopted those arguments. Respondents may chose to reassert them here if the Court accepts review, but they offer no reason to deny review.

CONCLUSION

The petition for writ of certiorari should be granted.

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4. California's interest in affording a hearing to all forced labor victims is rooted in the legitimate legislative purpose of assuring that respondents' ill-gotten gains are not exploited in California.

Respectfully submitted,

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APPENDIX

APPENDIX — STATUTORY NOTES TO CALIFORNIA CIVIL PROCEDURE CODE § 354.6

SECTION 1. (a) Thousands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California.

(b) These victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War.

(c) California has a moral and public policy interest in assuring that its residents and citizens are given ~~a~~ reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War.

(d) To the extent that the statute of limitations applicable to claims for compensation is extended by this act, that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any other provision of law prior to the enactment of this act.

SEC. 2. It is the intent of the Legislature, in addition to the provisions of this act, to enact additional public policy in any other case of proven patterns of slave labor employed by firms presently doing business in California that served as the basis of ill-gotten wealth at the expense of victims who are residents of California.

Appendix

SEC. 3. The Treasurer, the Public Employees Retirement System, and the State Teacher's Retirement System shall monitor and report to the Legislature on investments of the state and its pension funds in companies doing business in California, and affiliates of those companies, that owe compensation to victims of slave and forced labor from 1929 to 1945.

Section 1 to 3 of Stats. 1999, c.216 (S.B. 1245).